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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Article III, Section 1 of the Constitution of the United States permits Congress to impose a new tax on the compensation of sitting Article III judges.

2. Whether Article III, Section 1 of the Constitution of the United States permits Congress to impose, through a new tax, a discriminatory economic burden on sitting Article III judges.

3. Whether some Members of this Court, but less than all Members, are disqualified from hearing and deciding the case under 28 U.S.C. § 455(b)(4).

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ADDITIONAL STATUTORY PROVISION INVOLVED

The additional statutory provisions involved in this case, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1105 (1983), Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984), and Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986), are set forth in the Appendix to this brief.

The Appendix also sets forth 28 U.S.C. § 455 and 28 U.S.C.§ 2109.

COUNTER-STATEMENT OF THE CASE

The Constitution of the United States provides that the compensation of Article III judges "shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. This provision "is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). For this reason, "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation . . . ." *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933).

Recognizing this duty, a group of sixteen Article III judges brought this action against the United States of America. The judges[1] claimed that the United States diminished their compensation in violation of Article III of the Constitution by enactment of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Equity Act"), Pub. L. No. 97-248, 96 Stat. 324, the Social Security Amendments of 1983 ("1983 Amendments"), Pub. L. No. 98-21, 97 Stat. 65, and related statutes.[2]

1. In the early 1980s, Congress became concerned about the integrity of the Social Security system. The National Commission on Social Security Reform ("Greenspan Commission") was established by Congress to study this

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[1] References to the "judges" in this brief include the thirteen current federal judges in this case, one former federal judge, and the representatives of the estates of two deceased federal judges.

[2] These statutes collectively will be referred to as the "Social Security Amendments" or "Amendments."

problem and make recommendations about how to strengthen the system. *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (1981). At the time, over 90 percent of federal civilian employees, including federal judges, did not participate in the Social Security system.[3] The Greenspan Commission recommended that "all *newly hired* civilian employees of the Federal Government" should be added to Social Security to strengthen the program.[4] Congress accepted this recommendation, and the 1983 Amendments provided that federal civilian employees hired *after* December 31, 1983 would be subject to old age and survivors disability insurance ("OASDI") withholding.

Under the 1983 Amendments, the vast majority of the federal civilian employees hired before 1984 remained exempt from OASDI withholding.[5] The 1983 Amendments did, however, extend OASDI withholding to a small group of federal civilian employees that were elected, appointed or hired *before* January 1, 1984. Congress imposed immediate coverage on the President and Vice President, certain senior political appointees, members of Congress, certain legislative branch employees not already covered by CSRS, and sitting

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[3] Approximately 2.5 million of the 2.7 million federal civil employees in the United States did not participate in the Social Security system at the time of the 1983 Amendments. *See* Joint Stipulation ("Jt. Stip.") ¶ 19, Joint Appendix before the U.S. Court of Appeals for the Federal Circuit ("J.A.") at 96.

[4] Report of the National Commission on Social Security Reform at 2-7 (1983) ("Commission Report") (emphasis added).

[5] The Petition suggests that OASDI withholding, like hospital insurance ("HI") withholding, was extended to all existing federal civilian employees. Pet. 7. This is incorrect. While the Tax Equity Act made all existing federal civilian employees (including federal judges) subject to HI withholding, the 1983 Amendments specifically exempted the vast majority of such employees (but not federal judges) from Social Security withholding.

federal judges.[6] With the exception of federal judges, the group added under the 1983 Amendments consisted of political appointees or elected officials of the legislative and executive branches. In sum, less than one-half of one percent of the federal civilian workforce (or less than 12,500 employees) were mandatorily added to OASDI coverage as a result of the 1983 Amendments. Lynn Decl. ¶ 42(b), J.A. at 120-21.[7]

Congress' motivation to depart from the Greenspan Commission's recommendations, and to extend Social Security to existing elected officials and political appointees, is suggested by the dissenting views of Congressman Bill Archer to the Commission Report:

> [C]overage of only newly hired employees continues an inequity. Ironically, those now in Congress who must vote on the plan are themselves going to continue to be exempt from coverage. So will those presently employed by the federal government who will administer the changes.

Commission Report at Statement (6), page 2. Given this fact, Congress included itself and high level executive branch political officials in the 1983 Amendments as a symbolic act, signaling that they would "also have a vested interest in the future of the Social Security program." Lynn Decl. ¶ 42(b), J.A. at 120-21. Congress also extended Social Security to sitting Article III judges.

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[6] 42 U.S.C. § 410(a)(5)(C)-(G); *see generally* Jt. Stip. ¶ 29 & attached material, J.A. at 98, 104-06.

[7] The history the Social Security Amendments, and a careful analysis of the operation and effect of these statutes, is contained in the declaration of respondents' expert Peter R. Lynn, which was submitted by the judges in support of their motion for summary judgment. J.A. at 107-30.

2. At the time each judge in this case was appointed to the bench, their judicial salaries were *not* subject to withholding for Social Security coverage. Rather, Article III judges were (and remain) subject to special statutory retirement provisions that reflect their lifetime tenure. After meeting certain age and service requirements, an Article III judge may retire from active service (*i.e.*, assume senior status), but render service as he is able. In this event, the judge retains the salary of the office, including increases. 28 U.S.C. § 371(b). Alternatively, an Article III judge may retire from office and receive an annuity for the remainder of his lifetime equal to the judicial salary at the time of his retirement. 28 U.S.C. § 371(a). In addition, Article III judges have the option of contributing to the judicial survivors' annuity fund to provide for their survivors. 28 U.S.C. § 376.

Each judge in this case was appointed to his office by the President before January 1, 1983. It was on this date that Article III judges first became subject to the HI portion of Social Security withholding imposed by the Tax Equity Act, and on January 1, 1984, that judges first became subject to the OASDI portion of Social Security withholding imposed by the 1983 Amendments. *See* 42 U.S.C. § 410(a)(5), (p). Thus, in making the decision to accept a federal judicial appointment, each of the judges understood he would receive the statutory judicial income, calculated without deductions for Social Security. *See* Declarations of Judges, J.A. at 26-90. In addition, several took special note of, and relied specifically on, the savings that would result from the provision of statutory retirement benefits without Social Security deductions.[8]

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[8] *See, e.g.*, A.J. McNamara Decl., ¶ 3, J.A. at 45-46 (considered absence of Social Security deduction from judicial salary in calculating his ability to pay for college education of four children); Henry A. Mentz, Jr. Decl., ¶ 3, J.A. at 72-73 (absence of Social Security deduction

The result of the Social Security Amendments was that, for each year between 1984 and 1993, each of the judges saw his take-home pay reduced by an amount ranging from $2,532 to $5,321. In total, each judge had nearly $40,000 withheld from his compensation during the years 1983-1993. *Id.*

3. Congress recognized that the effect of the 1983 Amendments would be to subject federal civilian employees hired after January 1, 1984 to mandatory withholding for two different retirement programs (*i.e.*, Social Security and CSRS). In order to give these employees relief from dual withholding until a new federal retirement system could be created, Congress enacted the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 ("Adjustment Act"), Pub. L. No. 98-168, 97 Stat. 1106 (1983). Under the Adjustment Act, the total amount deducted from a new employee's salary was no greater than the amount withheld from an existing CSRS employee earning the same salary, even though the new employee was subject to both CSRS and Social Security. These new employees would eventually become subject to a new government retirement system, yet to be developed, and receive credit under that system for their interim service under CSRS. Adjustment Act § 207, 97 Stat. 1111, 5 U.S.C. § 8331 note at 995-96.

The Adjustment Act also included special provisions for the group of existing elected officials and appointees mandatorily added to Social Security on January 1, 1984. Congress recognized that "the rules [were] being changed in the middle of the game" for this group and provided them

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from judicial salary was a factor making judicial appointment attractive); Michael M. Mihm Decl., ¶ 3, J.A. at 79-80 (considered absence of Social Security deduction important in light of career in public service and family obligations).

with choices to harmonize their deductions for retirement programs. H.R. Conf. Rep. No. 542, 98th Cong., 1st Sess. 13 (1983) *reprinted in* 1983 U.S.C.C.A.N. 1625, 1628. The Conference Report on the Adjustment Act states:

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, *the affected group has no election other than to resign* (which in many instances would involve resignations from elected offices, lifetime judicial appointments, or presidentially appointed and Senate-confirmed positions).

Id. (emphasis supplied).

In order to "mitigate [this] unfairness," *id.*, the Adjustment Act allowed most of those mandatorily added on January 1, 1984 to choose from three options: (1) to discontinue participation in the covered retirement system (usually CSRS) and receive a refund of previous contributions (resulting in Social Security coverage only); (2) to participate fully in both the covered retirement system and Social Security; or (3) to participate in both systems subject to the Adjustment Act interim offsets applicable to new employees. Adjustment Act § 208, 97 Stat. 1111-12, 5 U.S.C. § 8331 note at 997.

While the provisions of the Adjustment Act would appear to encompass Article III judges, in actuality they do not. Neither the retirement provisions of the Judicial Code nor the Judicial Survivor's Annuity Fund were defined as "covered retirement systems" within the meaning of the Adjustment Act. Consequently, Article III judges were not entitled to reduce, much less eliminate, the effect of Social Security withholding on their salaries. Political appointees and members of Congress, in contrast, received two separate

opportunities to do so — one under the Adjustment Act and a second under the Deficit Reduction Act, enacted several months after the 1983 Amendments took effect. The Deficit Reduction Act allowed the same elections as the Adjustment Act retroactive to January 1, 1984. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984), 5 U.S.C. § 8331 note at 994-95. *See* Lynn Decl. ¶¶ 21-31, J.A. at 113-16.

In 1986, Congress established a new Federal Employees Retirement System — "FERS" — which combined Social Security with a basic benefit and an optional savings plan. Federal Employees Retirement System Act of 1986 ("FERS Act"), Pub. L. No. 99-335, 100 Stat. 514, *codified at* 5 U.S.C. §§ 8401-8479. While participants in CSRS were given the option to join FERS, FERS Act § 301(a), 100 Stat. 599, 5 U.S.C. § 8331 note at 990-91, only four percent chose to do so. Jt. Stip. ¶ 26, J.A. at 97. Ninety-six percent of eligible employees opted to retain CSRS coverage only. *Id.* As a result, even with the turnover in federal employees that had occurred since 1984, the majority of civilian federal employees were not subject to Social Security as of September 1991. *Id.* at ¶ 23, J.A. at 97.

Under the FERS Act, the same group of existing employees added mandatorily to Social Security on January 1, 1984 that had been given the opportunity to make elections under the Adjustment Act and the Deficit Reduction Act was once again given a choice of several retirement options. FERS Act § 301(b), 100 Stat. 599-600, 5 U.S.C. § 8331 note at 991. These choices once again permitted the eligible employees to offset the economic effect of the added Social Security withholding. As before, however, Article III judges were not eligible to make any elections to reduce the amount withheld from their salaries as a result of the imposition of Social Security deductions. Lynn Decl. ¶¶ 32-40, J.A. 117-19.

4. On December 29, 1989, the judges initiated this action by filing a complaint in what was then the United States Claims Court. The complaint alleged, *inter alia*, that the Social Security Amendments unconstitutionally diminished their compensation and unconstitutionally discriminated against federal judges. On November 9, 1990, the Claims Court (Turner, J.) dismissed the judges' complaint for lack of subject matter jurisdiction. Pet. App. 53a-54a. On appeal, the court of appeals reversed and remanded the case for a hearing on the merits of the judges' damages action. *Id.* at 45a.

On remand, the parties conducted discovery and filed cross-motions for summary judgment. On June 22, 1994, the Court of Federal Claims granted the defendant's motion for summary judgment. *Id.* at 37a. Although the trial court acknowledged that the judges' compensation "has been reduced by Social Security taxes . . . at least in terms of take-home pay," it nonetheless rejected the judges' claims on the basis of a four-step analysis. *Id.* at 23a.

First, finding that *Evans v. Gore*, 253 U.S. 245 (1920) had, in effect, been overruled *sub silentio*, the court held that the compensation of sitting Article III judges may be lawfully diminished through the imposition of a new tax. *Id.* at 24a-27a.

Second, the court held that the compensation of sitting judges may be lawfully diminished through the imposition of a tax from which those judges had been previously exempt, even when the economic effect of doing so is to make it relatively more attractive for sitting judges to leave the bench and return to private life. *Id.* at 27a-30a.

Third, the court characterized the diminution in question as an "indirect" diminution in compensation. *Id.* at 20a-22a. According to the court, "direct" diminutions (*i.e.*, reductions in statutory salaries) are always unconstitutional, while an

"indirect" diminution is unconstitutional only if a judge can demonstrate that it is the product of "legislative intent to influence the judiciary," a showing that the judges in this case did not make. *Id.* at 22a.

Finally, while acknowledging that "generally, Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax," *id.* at 33a, the court rejected the judges' contention that the Adjustment Act, the Deficit Reduction Act and the FERS Act discriminated against judges by failing to provide them the same elections as other federal employees. The court concluded that this disparate treatment of sitting Article III judges was constitutional because it did not reflect a demonstrated intent on the part of Congress to influence the judiciary. *Id.* at 34a-35a.

5. On August 30, 1995, the court of appeals reversed, holding that the Social Security Amendments diminish the compensation of Article III judges who took office prior to the enactment of the Amendments. *Id.* at 6a-7a. The court began by noting that the Compensation Clause "protects one of the most remarkable innovations" of the Constitution: the creation of a judicial branch sufficiently independent to enforce constitutional limits on the executive and legislative branches. *Id.* at 3a-5a. In furtherance of that goal and the goal of attracting good and competent individuals to the bench, "the Framers adopted an unrestricted protection for judicial compensation." *Id.* at 4a.

The court of appeals held that *Evans v. Gore*, 253 U.S. 245 (1920), controlled the case and that where federal law did not charge plaintiffs with the duty of paying the tax in question when they first assumed office (as in *Evans*), the subsequent imposition of the tax impermissibly reduced their salaries. *Id.* at 6a. The decision in *O'Malley v. Woodrough*, 307 U.S. 277 (1939) did not affect the analysis, since the claimant judge in that case had taken office after Congress

had made the taxes in question applicable to judges' salaries; thus, the "judicial claimants had suffered no diminishment in compensation after taking office." Pet. App. at 7a.

Based upon its review of the proceedings of the Constitutional Convention, the court of appeals also concluded that "compensation" under Article III was not limited merely to statutory salary and that compensation can be "diminished" within the meaning of the Compensation Clause "regardless of the intent or target of the reduction." *Id.* at 8a. The Convention sought to prevent the intrusions into judicial independence that could result if judges were required to approach the legislative or executive branches on matters affecting compensation. *Id.* at 9a. The court, therefore, rejected the Government's attempts to limit the reach of the Clause to "direct" diminutions, or to impose a requirement that claimant judges prove that Congress intended an attack on the judiciary's independence. *Id.* at 8a-11a.

The court of appeals did not reach the judges' independent contentions that the Adjustment Act, the Deficit Reduction Act and the FERS Act discriminated against judges by failing to provide them the same opportunities to avoid the economic impact of Social Security taxes as was provided to all other federal employees mandatorily required to pay those taxes. The court of appeals remanded for calculation of the amounts owed the judges in damages. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

This case does not warrant further review for three reasons. First, the court of appeals was clearly correct in concluding that the diminution in judicial compensation at issue here falls within the proscriptions of the Compensation Clause. Second, although the court of appeals did not reach the issue, the undisputed facts of record demonstrate that the Social Security Amendments diminished judicial compensa-

tion in a discriminatory manner; there is no dispute that a discriminatory diminution in judicial compensation is unconstitutional. Third, the court of appeals' decision is consistent with the purpose of the Compensation Clause and this Court's decisions under the Clause; the only effect of denying the petition will be to permit a limited class of Article III judges to recover damages for the unconstitutional diminution in their compensation.

I. THE RULING BELOW WAS CLEARLY CORRECT

There is no dispute that the Social Security Amendments, in fact, diminished the compensation of Article III judges. The court of appeals found that the "Social Security taxes diminished the claimants' salaries by specific amounts," Pet. App. 12a, and the Government does not challenge this finding. The question addressed by the courts below, and raised by the Government in its petition, is whether the diminution of compensation at issue here "is of the type forbidden by the Compensation Clause." Pet App. 23a. As the history and purpose of the Compensation Clause and long-standing precedent make clear, the answer to this question is yes.

1. The purpose of Article III, Section 1 of the Constitution is to ensure that the judicial branch is both competent and independent. *United States v. Will*, 449 U.S. 200, 217-18 (1980). Article III's dual guarantee of a lifetime appointment and protection from reduction in compensation is crucial to maintaining the independence of the judiciary, without which our system of checks and balances cannot function. In *The Federalist* No. 79, Alexander Hamilton explained:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general

> course of human nature, *a power over a man's subsistence amounts to a power over his will.*

The Federalist No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis is in original). By prohibiting the executive and legislative branches from exercising "control over the tenure and compensation of judges," Article III, Section 1 guarantees that the judiciary is "truly independent" and "free of improper influence from other forces within government." *Will*, 449 U.S. at 218.

The guarantees of Article III also serve to increase the stature and competence of the federal judiciary. In *Will*, this Court emphasized that the Compensation Clause:

> [E]nsures a prospective judge that, in abandoning private practice — more often than not more lucrative than the bench — the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhance[d] the quality of justice.

449 U.S. at 221 (citing *Evans v. Gore*, 253 U.S. 245, 253 (1920); 1 J. Kent, *Commentaries on American Law* 276 (1826)).

2. The court of appeals correctly concluded that the statutes at issue in this case diminish compensation in a manner that is inconsistent with both the language and the purpose of Article III, Section 1. Because the Framers "considered judicial independence a core value of the Constitution," they "adopted a broad protection for it" in the form of the Compensation Clause. Pet. App. 10a. The Clause, as this Court observed in *Evans*, "contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." 253 U.S. at 255. The language of the Clause thus plainly encompasses diminutions that result from the imposition of taxes on the

compensation of *sitting* Article III judges. This is the central holding of *Evans*.

As the court of appeals explained, the holding in *Evans* follows ineluctably from the purposes of the Clause. Pet. App. 7a, 9a-11a. The imposition of a new tax on the compensation of sitting Article III judges threatens both the independence and competence of the judicial branch in exactly the same manner as a diminution in the statutory salary. Both diminutions "withhold or take from the judge a part of that which has been promised by law for his services." *Evans*, 253 U.S. at 254. The ability to impose a new tax on sitting judges, like the ability to reduce their statutory salaries, makes the judges economically dependent on the other branches of government and undermines the incentive of "able lawyers to [join] the bench." *Will*, 449 U.S. at 221.

The same cannot be said with respect to judges who are appointed after the tax at issue is enacted. First, the language of the Compensation Clause provides that judges' compensation "shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1 (emphasis supplied). When a tax has been imposed on judicial compensation before a judge takes office, there is, by definition, no diminution in compensation during the judge's "Continuance in Office." Second, in these circumstances, there is no threat to judicial independence or competence. As the court of appeals explained, for judges who are appointed after a new tax is enacted, the tax is simply "a pre-existing obligation factored into [those] judges' compensation." Pet. App. 7a. It does not reduce the compensation "which has been promised by law for his services." *Evans*, 253 U.S. at 254.

The Court lost sight of this fundamental distinction in *Miles v. Graham*, 268 U.S. 501, 509 (1925), when it held that the Compensation Clause prohibited the imposition of a general federal income tax law on judges who assumed office *after* the tax became law. In reaching this conclusion, the

Court relied on *Evans*, which contained reasoning that was far broader than necessary to support its central holding. *See* Pet. 20-21. Indeed, as this Court observed in *Will*, the broad rationale of *Evans* suggests that the Compensation Clause "erect[s] an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." 449 U.S. at 227.

The Court criticized the broad rationale of *Evans*, and expressly overruled the holding of *Miles*, in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939). Like *Miles*, *O'Malley* involved a challenge to a federal income tax statute by a judge who was appointed to the court of appeals after the tax in question was enacted. The Court held that it would "trivialize the great historic experience on which the framers based the safeguards of Article III, § 1" to hold that "a non-discriminatory tax laid generally on net income" threatens "the independence of judges *who took office after Congress*" enacted the tax. *Id.* (emphasis supplied).

While the *O'Malley* Court criticized the broad reasoning of *Evans*,[9] it did not overrule the holding of that case. *Id.* at 281-82. Nor did the *Will* Court. 449 U.S. at 227. The lower courts, including the court of appeals here, have had no difficulty understanding that "in overruling *Miles v. Graham* and leaving *Evans v. Gore* standing, [the Court] obviously

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[9] The commentators at the time focused their criticism on the *Evans* Court's use of the intergovernmental tax immunity doctrine, which, as the Government notes, has since been disapproved. Pet. 20. They did not, by and large, criticize the holding of *Evans*. Moreover, contrary to the statement in *O'Malley* that *Evans* "was rejected by most of the courts before whom the matter came after that decision," the fact is that many states have adopted the *Evans* rule as a matter of state constitutional law. *See Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & Serg. 403 (Pa. 1843); *Long v. Watts*, 183 N.C. 99, 110 S.E. 765 (1922); *In re Opinions of the Justices*, 225 Ala. 502, 144 So. 111 (1932); *Gordy v. Dennis*, 176 Md. 106, 5 A.2d 69, 82 (1939).

meant to let the decision in the latter case rest upon its own facts." *Baker v. Commissioner*, 149 F.2d 342, 343 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945). *See also Atkins v. United States*, 556 F.2d 1028, 1044 (Cl. Ct. 1977) (*O'Malley* "by force of reasoning overruled *a good deal* of *Evans*") (emphasis supplied), *cert. denied*, 434 U.S. 1009 (1978).

3. This case illustrates why the central holding of *Evans* should not, as the Government urges, be reversed. When the judges in this case were appointed to the bench, each compared his compensation in private life, which already reflected Social Security withholding, to his prospective compensation as a judge, which included no diminution for Social Security withholding. Declarations of Judges, J.A. at 26-90. Based on a comparison of these two amounts, each judge accepted his appointment. *Id.* The Social Security Amendments significantly and adversely altered this economic calculus: they not only diminished the judges compensation, but they did so in a way that made the judicial office *relatively* less attractive. In other words, the statutes affected only one side of the economic scale on which the judge weighed his decision to accept appointment to the bench. Congress expressly recognized this fact, observing that individuals holding "lifetime judicial appointments" when these amendments were passed had no way to avoid the diminution in compensation "other than to resign." *See* 7, *supra*.

The effect of the Social Security Amendments, in short, is no different in constitutional terms than a reduction in the statutory salaries of Article III judges or, indeed, the imposition of a tax solely on the salaries of Article III judges. Each diminishes the compensation that was promised to sitting judges when they decided to accept their appointments to the bench, and thereby encourages them to return to private life. As the court of appeals recognized, this is precisely the sort of economic threat to judicial independence

and competence that the Compensation Clause was designed to prevent.

4. The Government quarrels with this conclusion, arguing that "[t]his Court's more recent decisions," do not support the view that the imposition of a nondiscriminatory tax on judicial compensation violates the Compensation Clause "even in the case of judges appointed before the tax took effect." Pet. 21. The only case that squarely addresses this issue, however, is *Evans*.

The Government draws support for its argument principally from the Court of Claims' opinion in *Atkins*, in which the court held that Congress' failure to *increase* judicial salaries to keep pace with inflation did not constitute a "diminution" in compensation within the meaning of the Compensation in Clause. *See* Pet. 22-23. Despite the palpable difference between *Atkins* and this case, the Government relies upon *dicta* from *Atkins* to bolster its contention that a diminution in compensation is unconstitutional only when it is a 'financially based attack on judicial independence,' and the product of 'a plan fashioned by the political branches . . . ineluctably operating to punish the judges *qua* judges, or to drive them from office.' *Id.* (quoting *Atkins*, 556 F.2d at 1054).

While the Framers undoubtedly wished to prevent such "attacks" on the Judiciary, the mechanism they chose to accomplish this end was a broad prohibition on any diminutions in judicial compensation. *Cf. United States v. IBM Corp.*, 64 U.S.L.W. 4419, 4424 (U.S. June 10, 1996) (the "broad language of the [Export] Clause" cannot be read to prohibit only "discriminatory taxes"; the "Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all"). Indeed, after the Claims Court decision in *Atkins*, this Court in *Will* struck down Congress' rescission of certain cost-of-living increases for judges despite the fact that the judges made no argument that

the rescissions in question were the product of a plan by the political branches to punish Article III judges, nor amounted to a financially based attack on judicial independence.

The irony of the Government's position is that if Congress truly wished to attack the independence of Article III judges by diminishing their compensation, what better way to accomplish this end than by extending to them a tax from which they were previously exempt. After all, a reduction in statutory salaries would not survive judicial challenge in light of *Will*; nor, in all likelihood, would a tax levied solely on the salaries of Article III judges. The extension of a tax from which judges had been previously exempt (in this case, exempt for nearly 50 years), however, would achieve two ends: it would make the judicial office relatively less attractive to those already holding it, while simultaneously preserving the appearance of legislative evenhandedness. The court of appeals correctly concluded that the extension of OASDI and HI taxes to sitting Article III judges is inconsistent with both the language and purpose of the Compensation Clause. There is no reason for this Court to review that judgment.

II. THE RULING BELOW IS INDEPENDENTLY SUSTAINABLE ON THE GROUND THAT THE STATUTES AT ISSUE DIMINISHED JUDICIAL COMPENSATION IN A DISCRIMINATORY MANNER

Although a showing of discrimination is not necessary to prove a violation of the Compensation Clause, *see Will*, 449 U.S. at 226 (the Clause "makes no exception for 'non-discriminatory' reductions"), there is no dispute that the Compensation Clause prohibits a statute that imposes a different and greater economic burden on Article III judges. *See O'Malley*, 307 U.S. at 282. If Congress enacts a statute that divides people into financially-advantaged and disadvantaged classes, and places Article III judges into the

financially-disadvantaged category, there will be an inevitable incentive for judges either (1) to seek to induce Congress to place them in the more favored class, or (2) to resign from office because the terms of the economic trade-offs they made when they accepted their appointments have been changed. The incentives created by this discrimination are, quite plainly, no different than the incentives that would result from a reduction in the statutory salary. Although the court of appeals did not reach the issue, the stipulated facts of record demonstrate that the Social Security Amendments and subsequent legislation diminished the compensation of Article III judges in a discriminatory manner.

1. The Social Security Amendments discriminated against Article III judges in that they imposed on those judges a new tax burden that was not borne by millions of working Americans. According to stipulated Social Security Administration data, 17.1 percent of the labor force (excluding the Armed Forces) was *not* subject to Social Security deductions as of December 1983, a figure which declined to 14.1 percent (*i.e.*, approximately 8 million employees) a year later after adoption of the 1983 Amendments. Jt. Stip. ¶¶ 18, 27, Table 4, J.A. at 95-96, 98, 100. Thus, unlike the income tax statutes at issue in *Evans* and *O'Malley*, Social Security taxes are not a duty that judges "share[] with all other[] [citizens]." *Evans*, 253 U.S. at 265 (Holmes, J., dissenting).

2. The statutes at issue also discriminated against sitting Article III judges in comparison to other federal employees. From the establishment of the Social Security system until the adoption of the 1983 Amendments, relatively few employees of the United States Government were covered by Social Security because old age, survivors, and disability benefits were already provided to these employees under existing publicly-financed systems established by Congress. Likewise, as the Government acknowledges, Article III judges were

excluded because "judges were (and are) covered by another retirement system established by 28 U.S.C. § 371." Pet. 5 n.1. According to Office of Personnel Management (OPM) estimates, as of September 1983, only 207,155 civilian federal employees (or 7.6 percent of the total) were covered by Social Security, while 2,503,914 civilian federal employees (or 92.4 percent of the total) were not subject to Social Security. Jt. Stip. ¶ 19, J.A. at 96.

The 1983 Amendments did not require OASDI coverage for the overwhelming majority of federal employees who, like the plaintiffs, were hired before 1984. Indeed, as of September 1984, only 13 percent of civilian federal employees (excluding postal service employees) — a total of only 268,006 employees — had become participants in OASDI coverage (including, of course, post-1983 new hires). *Id.* at ¶ 22, J.A. at 97. Even as of September 1991, after almost eight years of post-1983 new hires, the majority of civilian federal employees were still not subject to OASDI. *Id.* at ¶ 23, J.A. at 97. These figures reflect the fact that although pre-1984 federal employees were eligible to transfer to the new FERS system, which would subject them to Social Security coverage and withholding, only four percent elected to do so. An overwhelming 96 percent of eligible pre-1984 federal employees opted to retain their old non-Social Security retirement system. *Id.* at ¶ 26, J.A. at 97. Article III judges were discriminated against because they were not given this option.

3. In a series of statutes — the Adjustment Act, the Deficit Reduction Act and the FERS Act — Congress repeatedly discriminated against federal judges, denying them financial benefits and elections that it granted to other federal employees, including those mandatorily included in Social Security under the 1983 Amendments. As a result, federal judges *alone* had no choice but to bear the full economic

effect of having OASDI taxes withheld from their compensation.

a. After passing the 1983 Amendments, it became apparent to Congress that the increased financial burdens on federal employees would be considerable, since most new federal employees would be covered by the applicable federal retirement system as well as paying into OASDI. *See* Lynn Decl. ¶¶ 19-20, 43-44, J.A. at 112-13, 121-22. The Adjustment Act sought to deal with the problem in two ways. First, it lowered the payment by new federal employees for CSRS or other "covered retirement system" by the 5.7 percent of salary that would now have to be contributed to OASDI ("the interim offsets"). As a result, the typical CSRS contribution was lowered from 7.0 percent of salary to 1.3 percent of salary. *Id.* Second, it provided the small number of senior employees who were mandatorily covered by Social Security with a special election of retirement programs that permitted them to choose by December 31, 1983 whether to supplement Social Security with full CSRS coverage, take advantage of the interim offsets, or avoid CSRS coverage altogether. *Id.* at ¶¶ 21-26, J.A. at 114-15.

Neither the interim offsets nor the special elections were available to Article III judges. Thus, they were disadvantaged compared to both new federal employees and the other senior officials in the group added mandatorily to Social Security. In fact, Article III judges were the only federal employees newly covered by Social Security who were not eligible for these benefits, and consequently forced to pay increased retirement withholding. *See* Lynn Decl. ¶¶ 16, 27, J.A. at 111-12, 115.

b. The Deficit Reduction Act gave senior officials who were eligible to make the special elections under the Adjustment Act a second opportunity to make those elections. These officials were again allowed to elect the interim offsets or to opt out of CSRS entirely and thus to

avoid a net increase in out-of-pocket retirement expenditures, even with the addition of OASDI withholding. Again, however, federal judges were not provided with an election that would permit them to avoid the increase in total withholding due to OASDI. *See* Lynn Decl. ¶¶ 28-31, J.A. at 115-16.

c. In 1986, Congress finally replaced its "interim plan" by establishing the new FERS retirement system for most civilian federal employees hired after December 31, 1983. The FERS Act continued the pattern of discrimination against Article III judges. Rather than placing all persons covered by the CSRS interim plan under FERS, the FERS Act excluded from mandatory FERS coverage employees who, as of December 31, 1986, had at least five years of creditable service under CSRS. Instead, these employees were eligible for "CSRS Offset," which provided retirement cost reductions similar to the interim offsets under the Adjustment Act and the Deficit Reduction Act. As a result, they had the option to avoid entirely any net out-of-pocket expenditure for OASDI. No federal judge was eligible for this benefit because none had been permitted to elect CSRS at any point in time (although all but one of the judges in this case had been in federal service for five years as of December 31, 1986). *See* Lynn Decl. ¶¶ 32-40, J.A. 117-19.

In addition, the FERS Act provided special advantages for the government officials (other than judges) who were added to Social Security. It excluded from mandatory FERS coverage all senior officials who had been eligible for special election opportunities under the Adjustment Act and the Deficit Reduction Act and who had served continuously as senior officials from December 31, 1983. These senior officials were also eligible under the FERS Act for CSRS Offset, with the result that they could, once again, choose to avoid net out-of-pocket expenditure for OASDI. Again, however, Article III judges were not eligible; they did not

have the prerequisite special election opportunities under the Adjustment Act or the Deficit Reduction Act. *Id.* Federal judges, as a result, had no alternative that would allow them to avoid the extra cost of OASDI withholding from their compensation. The FERS Act thus clearly discriminated against the judges in that it imposed a substantial financial burden that was not required to be borne by any other federal employee.

4. The taxes imposed on sitting federal judges by the statutes at issue are not, in short, taxes "of general, non-discriminatory application to all earners of income." *O'Malley*, 307 U.S. at 280. Millions of working Americans were exempt from these taxes in 1983 and remain exempt today. Moreover, in extending these taxes to Article III judges, Congress did so in a manner that imposed a far greater economic burden on the judges than on any other federal employees. This discrimination renders the statutes at issue here unconstitutional under the Compensation Clause.

III. THE RULING BELOW HAS LIMITED PRECEDENTIAL AND REMEDIAL IMPLICATIONS

1. The petition suggests that the court of appeals' decision "has significance well beyond" the facts of this case. Pet. 14. This is difficult to see. In more than 200 years of constitutional interpretation, this is only the second case to raise before this Court the issue of whether the Compensation Clause prohibits the imposition of a tax on sitting Article III judges. Because the court of appeals' decision affects, at most, only those Article III judges who accepted their appointments prior to January 1, 1984, the remedial implications of the decision are of limited scope and duration. Indeed, Congress could readily cure the constitutional defect in a number of different ways, including an amendment that would give Article III judges the same options it gave other federal employees to participate in the Social Security and

Medicare programs as a supplement to their existing retirement system.

2. The Government argues that review is nevertheless appropriate because the reasoning of the court of appeals' decision suggests that "Congress would have to freeze the income tax rate, deductions, and credits applicable to every federal judge (insofar as the tax fell on the judge's salary) at the moment that each judge took office." Pet. 24. In the 75 years since *Evans v. Gore* was decided, this claim has never been made, and the court of appeals' decision lends no support to such a claim. The distinction between *O'Malley* and *Evans*, as the court observed, is that a judge who is appointed *after* a tax is enacted accepts the appointment with knowledge that the specified compensation will be subject to the tax. Pet App. 7a. Indeed, in *O'Malley*, the Court emphasized that the income tax statute "gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes." 307 U.S. at 279. A judge who accepts an appointment subject to a tax necessarily accepts the prospect that the rate of tax may change. Unless a tax rate is changed in a discriminatory manner with respect to Article III judges, the change will apply equally to judicial compensation and private compensation, and will pose no potential threat to judicial independence or competence. The court of appeals' decision does not hold otherwise.

THE DISQUALIFICATION ISSUE

The Government raised, in a nearly two-page footnote, the issue of "whether some of the members of this Court are disqualified from hearing and deciding this case." Pet. at 25-26 n.12. Respondents agree that this issue is squarely presented by this case. Whether one or more Justices is disqualified from hearing this case because he or she "has a financial interest in the subject matter in controversy ... or any other interest that could be substantially affected by the

outcome of the proceeding" is, of course, for each Justice to decide. 28 U.S.C. § 455(b)(4). In this section we discuss a number of factual and legal issues that are relevant to this judgment, and respond to the arguments set forth in the petition.

1. The judicial disqualification statute contains two different provisions that may apply in this case. First, the statute requires disqualification where a Justice "has a financial interest in the subject matter in controversy." 28 U.S.C. § 455(b)(4). The statute defines "financial interest" to mean "ownership of legal or equitable interest, however small." 28 U.S.C. § 455(d)(4). *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 n.8 (1988) ("§ 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates appearance of impropriety.") Second, even if there is no financial interest in the subject mater in controversy, the statute requires disqualification where a Justice has "any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4).

These provisions are relevant here because a Justice who is eligible to recover damages for the diminution in compensation resulting from the imposition of Social Security taxes may, as the Government observes, "sue in the Court of Federal Claims and gain the benefit of the court of appeals' decision in this case." Pet. 15. *See also* Pet. 25 n.12 (a Justice "eligible to receive refunds of the taxes challenged in this case ... arguably would have 'a financial interest in the subject matter in controversy,' that would require disqualification under 28 U.S.C. 455(b)(4).").

2. The Government correctly observes that any eligible Article III judge who files a new lawsuit seeking damages for the diminution in compensation resulting from the imposition of Social Security taxes will be limited in the amount of his or

her claim by the statute of limitations. Although the Government repeatedly denominates the judges' claim in this case as one for "tax refund," it is in fact (as the Government acknowledges elsewhere in the petition) a claim for damages. *Compare* Pet. 9, 25 n.12 (claim for refund) *with* Pet. 10 (claim for damages). Indeed, the Government initially obtained dismissal of the judges' damages action on the ground that it was "a tax refund suit over which the Claims Court ... lacks subject matter jurisdiction because the plaintiffs failed to file an administrative claim for refund." Pet. App. 49a. The court of appeals reversed, however, finding that the judges had stated a claim for damages under the Compensation Clause and the Tucker Act, 28 U.S.C. § 1491(a)(1). Pet. App. 41a, 45a. The Government has not sought review of this decision.

Thus, contrary to the Government's contention (Pet. 25 n.12), the six-year statute of limitations for damages, 28 U.S.C. § 2401(a), not the shorter statute applicable to tax refund claims, 28 U.S.C. § 6511(a), would apply to a judge's claim for damages resulting from the unconstitutional diminution in his or her compensation as a result of the Social Security Amendments. Under the applicable statute of limitations, a civil action is barred "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). In this case, the withholding of Social Security taxes is a continuing violation of the Constitution, and a new cause of action accrues every time the taxes at issue are withheld from an eligible judge's compensation. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). A judge who files suit in 1996, therefore, would be entitled to seek damages for any diminution in his or her compensation that would have occurred during the preceding six years.

3. For the reasons discussed in Section I, many Article III judges are simply not eligible to obtain relief under

the court of appeals' decision. For example, any Article III judge who was first appointed to the bench after January 1, 1984 is not eligible to obtain relief because the appointment occurred after the statutes at issue took effect.

Likewise, an Article III judge who was first appointed to the federal bench before January 1, 1984, but accepted a new appointment after January 1, 1984, could not collect damages for the period following the new appointment. This was the situation the Court faced in *O'Malley*, where Judge Woodrough, a circuit court of appeals judge, had been appointed to the district court before the tax at issue was passed, but was elevated to the court of appeals after the tax was passed (and sought a refund of income taxes paid three years after his second appointment). The Court held that the prior appointment to the district court was "wholly irrelevant to the matter in issue." 307 U.S. at 279-80. The Court reasoned that "[t]he two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar." *Id.* at 280.

Three examples illustrate how these constitutional principles interact with the applicable statute of limitations in this case. (1) A judge who was appointed to an Article III court before January 1, 1984, and filed suit in 1996, would be entitled to damages under the court of appeals' decision for the period 1990 through 1996. (2) A judge who was appointed to an Article III court before January 1, 1984, but was then appointed to another court before 1990, would be barred from bringing a claim under the court of appeals' decision by the statute of limitations. This is because the judge's only cognizable damage occurred during the term of his or her first appointment — a period that is outside of the statute of limitations. (3) A judge who was appointed to an

Article III court before January 1, 1984, and was then appointed to another court during the six years preceding the filing of his or her lawsuit would be able to collect some damages under the court of appeals' decision. The damages period would begin six years prior to the filing of the complaint and end on the date of the second appointment. Thus, a judge whose second appointment occurred on July 1, 1994, and who filed suit July 1, 1996, would be entitled to recover damages for the period July 1, 1990 through July 1, 1994.

4. The Government contends that claims for damages that fall within the statute of limitations are nevertheless precluded by the enactment of increases in the stated salaries of Article III judges since 1983 (as those increases cumulatively are greater than the HI and OASDI taxes deducted during that period). The Government is wrong that a general salary increase, not tied to the diminution caused by HI and OASDI taxes, precludes the claims at issue in this case. This contention was implicitly rejected in *Will*, where the unconstitutional diminution found to have occurred in "year 1" (which was an average of 4.8 percent of salary) was more than overcome by the subsequent increase in judges' salaries in "year 4" (an average of 10.41 percent). *See* 449 U.S. 205-06, 208-09, 224-26. Moreover, this contention (although litigated below) is not before this Court since it was not raised by the question presented nor was it raised by the Government as a reason why the petition should be granted.

5. Finally, Respondents do not agree with the Government's contention that the Rule of Necessity applies to this case. As this Court explained in *Will*, the Rule of Necessity comes into play only in cases in which "all Article III judges have an interest in the outcome." 449 U.S. at 212. The purpose of the rule is to ensure that, in these unusual circumstances, the litigants are not "denied their right to a forum." *Id.* at 217.

The Rule of Necessity does not apply here because, for the reasons explained above, many federal judges have no financial (or other disqualifying) interest in this case. In the proceedings below, the trial judge was an Article I judge, and each of the three court of appeals' judges was appointed to the bench after January 1, 1984. Indeed, nine of the eleven judges currently sitting as active judges on the U.S. Court of Appeals for the Federal Circuit were appointed to the bench after January 1, 1984. No party raised the disqualification issue below, nor argued that the Rule of Necessity applied, because the judges who heard this case had no disqualifying interest in the matter.

The Government now contends, however, that the Rule of Necessity "arguably" applies because the court of appeals' decision establishes a precedent that "may ... affect Congress's authority in the future to impose new taxes on judicial salaries," or to take other actions. Pet. 26 n.12. If this is so, then the judicial disqualification statute sweeps very broadly indeed. For example, under the Government's reasoning, no judge who owns securities could decide the legal questions presented by a securities case because the precedent established might affect the value of his or her securities in some future case decided by another court. Such a contingent and speculative "interest" has never been held by this Court to require disqualification under Section 455.

To be sure, if four or more members of this Court disqualify themselves from hearing this case, the Court will lack a quorum. 28 U.S.C. § 1. But that does not mean that the Rule of Necessity applies. There is, after all, no requirement that the Court hear this case. Indeed, Congress has expressly provided for the possibility that disqualifications might deprive the Court of a quorum. Under 28 U.S.C. § 2109, if this Court lacks a quorum, and "a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the

court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." *See, e.g., Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *Arizona v. United States District Court of Arizona*, 459 U.S. 1191 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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